Filed 10/18/04 In re N.F. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re N.F. et al., Persons Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. KRISTINA D. et al., Defendants; N.F. et al., Appellants.	C045994 (Super. Ct. Nos. JD219673, JD219674, JD219675)

Minors N.F., J.F., and B.D. appeal from the juvenile court orders granting reunification services to mother K.D. (Welf. & Inst. Code, §§ 361.5, 395.)[1] Minors contend the juvenile court

[1] Undesignated statutory references are to the Welfare and Institutions Code.

committed reversible error in granting mother services. Disagreeing with that claim, we shall affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

On August 13, 2003, the Sacramento County Department of Health and Human Services (DHHS) filed original juvenile dependency petitions pursuant to section 300 on behalf of the minors, who ranged in age from five to 12 years old at that time. Those petitions alleged in part that mother's home was unsafe and contained drug paraphernalia. The petitions also alleged mother's home had been the scene of domestic violence and lewd and lascivious acts perpetrated against two of the minors.

DHHS reported mother has a 1992 arrest for possession and use of a controlled substance, followed by a 1994 commitment to drug diversion, which was later terminated, and criminal proceedings reinstated. According to DHHS, in 1996 mother was convicted on possession of narcotics charges. Mother admitted her drug abuse began when she was 11. She was a methamphetamine and marijuana user. However, mother denied any current use.

The social worker's report noted mother had been ordered into drug treatment in 1996, but failed to complete it. Moreover, mother had entered treatment on her own initiative. DHHS recommended reunification services for mother. According to the social worker, mother and the minors were bonded. Two of the minors stated they wished to return to mother if she were able to maintain sobriety. The minors wanted mother "to be

given a chance to succeed this time." Under these circumstances, the social worker believed that failing to attempt reunification "would be detrimental" to the minors. DHHS also opined that mother met the criteria to participate in drug treatment programs, and would benefit from those programs.

However, in written argument, the minors asserted they did not want to live with mother. Minors urged the juvenile court to deny mother reunification services. Mother argued she was never offered substance abuse treatment for her drug problem. Mother also asserted there was no clear and convincing evidence she had resisted previous court-ordered treatment. She urged the court to grant her services.

The juvenile court sustained the dependency petitions in large part. Thereafter, at the December 2003 dispositional hearing, a social worker testified that in 1994 mother had been committed to a drug diversion program. Mother told the juvenile court that she did not recall being ordered to participate in any kind of drug treatment program. Minors' counsel argued the drug diversion order constituted court-ordered treatment within the meaning of section 361.5, subdivision (b)(13) (hereafter section 361.5(b)(13)), supporting a denial of services for mother. Mother's counsel retorted there was no clear and convincing evidence that mother had been offered court-ordered drug treatment.

In ruling that the statutory bar to reunification services did not apply to the proceedings, the juvenile court stated in

part: "The problem I'm having at this point, I understand the court file may have been destroyed, so we don't get to see what the order was or that there was an order, and I seem to recall -- and my criminal law days predate any of this. I didn't do criminal law after the middle, late [1980's], but my recollection of diversion prior -- she wasn't even born in the late [1980's]. [¶] Just kidding. My recollection of diversion at least in the days I was dealing with it was it was a civil matter and that criminal proceedings were suspended during the period of time that diversion was being attempted, and if successful, then the charges were dismissed. [¶] And there was a requirement for a guilty plea but only to prevent the need for proof to be returned to court a year after the offer had been made to diversion and that the consequence of not completing diversion was criminal charges would be reinstated. [¶] In this case, criminal charges are then reinstated, and they're immediately dismissed."

The juvenile court also stated: "I don't remember it as being a court order. I remember it as being an offer to be allowed to participate in something that was not through the Probation Department, that was not through the criminal courts, it was outside of the criminal courts, although it had to be a program that was approved by the Courts, and they had diversion in certain kinds of molest cases as well. [¶] But, again, it was a civil treatment program outside of the criminal process

that allowed the possibility that criminal charges would be avoided."

After further discussion and testimony, the juvenile court stated its decision: "It's clear there isn't enough evidence to establish that the mother was under a court-ordered program of any kind. She has no memory of it. [¶] [The social worker] was only able to make some assumptions from what he sees on a [rap] sheet. And I know that at least one of his assumptions -- actually, it's not on the [rap] sheet, but he talked about there being warrants for failure to appear. You don't get a failure to appear for drug diversion. When they terminate diversion, they notify you of the new court date, and you get the failure to appear for not showing up at the new court date. [¶] But there's insufficient evidence how all this came about for me to make a determination that she was involved in a court-ordered treatment program. [¶] . . . [¶] But I have to find by clear and convincing evidence that she was ordered to do it, and I don't find that this record is sufficient to do that."

At the conclusion of the dispositional hearing, the juvenile court adjudged the minors dependent children and granted mother reunification services. Thereafter, the juvenile court rejected as untimely an application for rehearing filed by the minors. This appeal by the minors followed.

DISCUSSION

I

Minors contend that, "[i]nstead of exercising his discretion to make a determination pursuant to section 361.5, subdivision (c) as to whether the provision of reunification services to the mother was in the best interest of [minors], the referee concluded -- based on his personal experience as a criminal lawyer in the 1980's -- that [section 361.5(b)(13)] did not apply because in 1994, drug diversion did not constitute court-ordered treatment." Minors assert that such reliance on personal experience by the trier of fact constitutes judicial misconduct, requiring reversal.

The record reflects that, although counsel for the minors had the opportunity to do so, counsel failed to tender any objection to statements made by the juvenile court in its ruling on whether mother would receive reunification services. Acknowledging the possibility of forfeiture of the claim, minors urge this court to exercise its discretion and consider the judicial misconduct claim on the merits.

Ordinarily, when a party fails to preserve a claim by tendering it in the trial court, the claim is forfeited on appeal. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.) Here, as we have seen, minors failed to make the claim in the juvenile court. Accordingly, absent any exceptional circumstance, we need not consider the matter on appeal.

In any event, minors have failed to establish misconduct. Contrary to their claim, the record does not support the proposition that the juvenile court based its decision on extraneous information. As the portions of the transcript quoted above indicate, the court based its determination to grant mother reunification services on the evidence adduced at the hearing. Under the circumstances, which involved events occurring many years before, it is understandable that there would be discussion among the parties and the court about the law and procedure existing at that time. There was no judicial misconduct.

II

Minors claim the finding by the juvenile court that a statutory disqualification for reunification services was inapplicable to the proceedings is not supported by substantial evidence. According to the minors, the statutory bar to services applied as a matter of law. Therefore, minors argue, the matter should be remanded for an evidentiary hearing and an exercise of discretion by the court.

The version of section 361.5 in effect at the time of the dependency proceedings in 2003 provided in part:

"(b) Reunification services need not be provided to a parent . . . described in this subdivision when the court finds, by clear and convincing evidence, any of the following:

[¶] . . . [¶] (13) That the parent . . . of the child has a history of extensive, abusive, and chronic use of drugs or

alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible."

Subdivision (c) of section 361.5 stated in part: "The court shall not order reunification for a parent . . . described in paragraph . . . (13), . . . of subdivision (b) unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child."

Ordinarily a parent is entitled to reunification services. (§ 361.5, subd. (a).) This entitlement is based on the legislative preference for maintaining family relationships. (*In re Rebecca H.* (1991) 227 Cal.App.3d 825, 843.) The exceptions to that principle, enumerated in subdivision (b), are narrow in scope and subject to proof by the clear and convincing standard of evidence. (*Rebecca H.*, at p. 843.) The proponent of denying a parent services has the burden of proof to establish a ground on which the juvenile court may refuse to grant services. (*In re Christina A.* (1989) 213 Cal.App.3d 1073, 1079.)

Authorizing the juvenile court to deny reunification services to parents under certain circumstances reflects a legislative determination that sometimes reunification will not

serve the interests of the minor. For example, where a parent has not addressed adequately a history of substance abuse, it may be a futile act to order services. (*Karen S. v. Superior Court* (1999) 69 Cal.App.4th 1006, 1010.) In this case, the record reflects mother has a long history of chronic drug abuse.

Under section 361.5(b)(13), a parent has resisted prior court-ordered treatment for chronic use of drugs when the parent has participated in a court-ordered treatment program but continues to abuse illegal drugs, or when the parent refuses to participate in such a program. (*In re Levi U.* (2000) 78 Cal.App.4th 191, 200.) "In either case, a parent has demonstrated a resistance to eliminating the chronic use of drugs or alcohol which led to the need for juvenile court intervention to protect the parent's child. In other words, the parent has demonstrated that reunification services would be a fruitless attempt to protect the child because the parent's past failure to benefit from treatment indicates that future treatment also would fail to change the parent's destructive behavior." (*Karen S. v. Superior Court, supra,* 69 Cal.App.4th at p. 1010.)

In *In re Brian M.* (2000) 82 Cal.App.4th 1398, 1401, relied on by mother, the mother was arrested on drug charges and entered a deferred judgment program, but failed to comply with program requirements. Sentenced to a probationary term, one condition of which included completion of a drug rehabilitation program, the mother failed to attend the program. The juvenile

court denied the mother reunification services based on her resistance to drug treatment. (*Ibid.*)

The Court of Appeal held that the order requiring the mother to enter a rehabilitation program as a condition of probation was the "functional equivalent of enrollment in a drug program." (*In re Brian M., supra,* 82 Cal.App.4th at p. 1402.) According to the court, the record contained substantial evidence supporting the juvenile court's finding that she resisted prior treatment for her drug abuse. (*Id.* at p. 1403.) Under those circumstances, the juvenile court had the discretion to deny services. (*Ibid.*)

The court in *Brian M.* stated that the juvenile court "may" deny reunification services to a parent if the court finds the parent satisfies the criteria found in section 361.5, subdivision (b). (*In re Brian M., supra*, 82 Cal.App.4th at pp. 1401-1402.) Similarly, in *Karen H. v. Superior Court* (2001) 91 Cal.App.4th 501, 505, where this court denied a parent's petition for extraordinary relief, we noted that section 361.5, subdivision (b), "permits" the court to deny services when the statutory disqualification is shown. (*Karen H.,* at p. 504.) These interpretations are consistent with the language of subdivision (b), which states that services "need not be provided" to a parent who comes within one of the statutory requisites for disqualification.

In this case, whether or not the juvenile court concluded correctly that mother came within section 361.5(b)(13), by the

express terms of that provision it had the discretion to grant mother reunification services. Discretion is abused only when it is exercised "'in an arbitrary, capricious or patently absurd manner that result[s] in a manifest miscarriage of justice.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Under the circumstances of this case, the juvenile court did not act arbitrarily or capriciously in granting mother reunification services. The record reflects some reason for optimism about mother's prospects for reunification with the minors, despite her long history of drug abuse. In fact, DHHS recommended mother be granted services. Moreover, the record of mother's previous history of involvement in drug treatment was sketchy at best. On this record, there was no abuse of discretion in the court's decision to grant mother services.

DISPOSITION

The orders of the juvenile court are affirmed.

BUTZ, J.

We concur:

SIMS, Acting P. J.

RAYE, J.